

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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NEW YORK UNIVERSITY,	:	
	:	
Employer,	:	
	:	
and	:	Case No. 2-RC-23481
	:	
GSOC/UAW,	:	
	:	
Petitioner	:	

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	:	
	:	
POLYTECHNIC INSTITUTE OF	:	
NEW YORK UNIVERSITY,	:	
	:	
Employer	:	
	:	
and	:	Case No. 29-RC-012054
	:	
INTERNATIONAL UNION, UNITED	:	
AUTOMOBILE, AEROSPACE, AND	:	
AGRICULTURAL IMPLEMENT	:	
WORKERS OF AMERICA (UAW)	:	
	:	
Petitioner	:	
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MEMORANDUM IN OPPOSITION TO MOTION FOR RECUSAL

I. INTRODUCTION

This is the second time New York University ("NYU" or "the Employer") has sought to delay or prevent a decision in this case by raising a specter of impropriety or conflict of interest by a member of the NLRB. On August 11, 2011, NYU filed a Motion for Recusal of then Chairman Wilma Liebman, on the ground that she had attended an

academic conference with a professor who testified as an expert witness in Case No. 2-RC-23481. Now, Attorney Brill has filed a Motion for Recusal of Board Member Nancy Schiffer based upon the fact that she worked in the Petitioner's legal department 13 years ago. This blatant effort to manipulate the decision-making process should be rejected forthwith.

These petitions were filed by branches of the UAW. In Case No. 2-RC-23481, GSOC/UAW¹ seeks to represent a unit of student employees of NYU, including *inter alia*, graduate student adjunct faculty members and research assistants. In Case No. 29-RC-012054, the UAW seeks to represent a unit of graduate student employees at Polytechnic Institute of New York University. Both petitions were dismissed on the authority of Brown University, 342 N.L.R.B. 483 (2004), which holds that graduate student assistants are not employees of the university in which they are enrolled. On June 22, 2012, the Board granted the Union's request for review on both cases and consolidated those cases for briefing of four issues. The submission of briefs, reply briefs and *amicus* briefs was completed in August 2012. No further action has been taken by the Board on these cases.

NYU bases its Motion on two grounds. First, it contends that Member Schiffer should recuse herself because she was Deputy General Counsel of the UAW when the UAW filed and litigated the petition in Case No. 2-RC-22082 ("NYU I"), seeking an election among student employees of NYU. That case was closed in 2000, shortly after Member Schiffer left her employment with the UAW. NYU contends that she is precluded from deciding any "matter" that was litigated with the involvement of any UAW attorneys while Member Schiffer was employed in the UAW legal department.

¹ "GSOC" stands for "Graduate Student Organizing Committee."

NYU argues that this case, which was filed nearly ten years after NYU I was closed and ten years after she had left the UAW, is somehow the same “matter” as NYU I. There is no legal or rational basis for such an expansive definition of a legal matter.

The second basis for the motion is that Member Schiffer would be biased in this matter because she receives retirement benefits from UAW benefit funds as a result of her past employment with the UAW. The very legal precedent upon which NYU and its experts rely to support this argument actually stands for the contrary proposition: that the receipt of retirement benefits from a party is generally **not** ground for recusal.

Therefore, NYU’s motion should be denied.

II. THE CLAIM THAT MEMBER SCHIFFER SHOULD BE DISQUALIFIED BECAUSE SHE WAS DEPUTY GENERAL COUNSEL AT THE TIME OF NYU I

A. Litigation Concerning the Representation of Graduate Student Employees of NYU

In May 1999, the UAW filed the petition in NYU I, seeking to represent a unit of graduate student employees employed by NYU, including teaching assistants (“TAs”), research assistants (“RAs”), and graduate assistants (“GAs”). On April 3, 2000, following a hearing conducted over many months, the Regional Director for Region 2 issued a Decision and Direction of Election in a unit of graduate student employees that differed slightly from the unit initially petitioned for, but that included TAs, RAs and GAs. On May 10, 2000, the Board granted the Employer’s Request for Review and, on October 31, 2000, issued its unanimous decision (Member Hurtgen concurring), affirming the Regional Director’s decision. New York University, 332 N.L.R.B. 1205. The ballots of the employees were opened and counted, and a majority of the employees in that unit were found to have voted in favor of representation. On

November 15, 2000, the Board issued a Certification of Representative, and Case No. 2-RC-22082 was closed (NYU Dec. 7)².

After that case closed, the UAW and NYU signed a letter agreement in which the University recognized the Union and committed to bargain over graduate student employment. (Pet. Ex. 5; Tr. 130). The parties began bargaining a first contract in April 2001, and reached a tentative agreement in January 2002. (Tr. 131-32). The agreement was ratified by the membership on January 30, 2002, retroactive to September 2001. (Pet. Ex. 6; Tr. 137). This CBA remained in effect through August 31, 2005. (Pet. Ex. 6).

On July 13, 2004, the Board issued its decision in Brown, holding categorically that all "graduate student assistants are not employees within the meaning of Section 2(3) of the Act," 342 N.L.R.B. at 493, overruling the decision in NYU I. When the collective bargaining agreement expired, NYU withdrew recognition from the UAW in reliance on the holding in Brown, resulting in a lengthy strike (Tr. 138-39, Er. Ex. 4, 2nd page).

On May 3, 2010, the UAW filed the instant petition seeking, to the extent possible, to re-establish the bargaining relationship that had ended in 2005. In its attempt to achieve this objective, the Union has confronted the fact that NYU has implemented substantial changes to the terms and conditions of employment of its graduate student employees. NYU described these changes at length in its Opposition to Petitioner's Request for Review, filed July 14, 2011:

² References to the Acting Regional Director's Decision and Order Dismissing Petition in Case No. 2-RC-23481 shall be designated as "NYU Dec." References to the Petitioner's Exhibits for that case shall be designated "Pet. Ex." followed by exhibit number, and the Employer's Exhibits as "Er. Ex." followed by Exhibit number.

Petitioner treats this case as if the clock can simply be rolled back 11 years, stating it seeks to represent the same unit of graduate student employees of NYU that it represented following the decision in [NYU I]. It pretends the case involves teaching assistants, who no longer exist at NYU.... Petitioner thus disingenuously disregards the fundamental restructuring of graduate student financial aid program that resulted in the elimination of teaching assistants.

(Opposition to Petitioner's Request for Review at 1-2). After describing some of the changes that it had made, the Employer continued:

The record, however, demonstrates the significant changes made by NYU in connection with graduate student financial aid, reforms which separated, to the greatest extent possible, the work done by graduate students as teachers from their other activities as students. As a result, the current graduate student adjuncts are different in a number of important respects from the teaching assistants whose status was examined by the Board [in NYU I].

(Opposition to Petitioner's Request for Review at 2-3). Leaving aside the Employer's attempt to distort the Union's argument, this statement accurately reflects the nature of the primary factual issue litigated in this case. As the Employer states, this case concerns the new terms and conditions of employment implemented over the past ten years after NYU I closed. The hearing in this case was conducted on 19 days and generated hundreds of exhibits. Nearly all of this evidence related to events that occurred after Case No. 2-RC-22082 was closed.

B. NYU's Allegations Regarding Member Schiffer's Involvement in NYU I

NYU's argument in support of recusal is based upon the fact that Member Schiffer served as Deputy General Counsel of the UAW while NYU I was pending. The Employer notes that, while the actual litigation of that case was conducted by attorneys from a New York law firm, another attorney in the UAW legal department, Betsey Engel, received copies of legal papers filed in the case. As Deputy General Counsel, Schiffer

had administrative duties for the UAW Legal Department which NYU presumes included some responsibility for supervising Attorney Engel. Viewing the documentation provided by NYU in the most favorable possible light, an inference may be drawn that Member Schiffer, as Deputy General Counsel, played a role in supervising the litigation of NYU I, and she worked in the same office as an attorney who played some role in litigating that case. Member Schiffer left the UAW in 2000.

C. **Member Schiffer's Service With the UAW 10 Years Before This Petition was Filed is Not Grounds for Recusal**

1. **General Legal Principles**

NYU and its expert supporters write passionately of the importance of an unbiased decision-maker to the parties in adjudication. That point is beyond dispute. However, there are competing considerations when a motion for recusal is filed. The courts have recognized that parties should not be allowed to use motions for recusal as a mechanism to delay legal proceedings or to prevent a decision in a case. NYU relies heavily on the provisions of the judicial code governing recusal, particularly 28 U.S.C. Sec. 455, as guidance to Board Members regarding when recusal is required. The House Committee report regarding Sec. 455 cautions, "[E]ach judge must be alert to the possibility that those who would question his impartiality are in fact seeking to avoid the consequences of his expected adverse decision . . . [I]itigants . . . are not entitled to judges of their own choice." H.R. Rep. No. 93-1453 (Oct. 9, 1974). As the Second Circuit stated:

In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case.... **A judge is as**

much obliged not to recuse himself when it is not called for as he is obliged to when it is.

In re Drexel Burnham Lambert, Inc., 861 F.2d 1307, 1312 (1988) (internal citations omitted, emphasis added).

The point was made more colorfully:

While recusal motions serve as an important safeguard against truly egregious conduct, they cannot become a form of brushback pitch for litigants to hurl at judges who do not rule in their favor.... [R]ecusal decisions reflect not only the need to secure public confidence through proceedings that appear impartial, but also the need to prevent parties from too easily obtaining the disqualification of a judge, thereby potentially manipulating the system for strategic reasons....

Pitrolo v. County of Buncombe, 2013 U.S. Dist. LEXIS 19364 (W.D.N.C.) at *17, quoting Belue v. Leventhal, 640 F.3d 567, 574 (4th Cir. 2011). These concerns are especially pertinent in the case of an administrative agency where the law makes no provision for the replacement of a decision-maker who recuses herself. There is particular reason to be alert to the possibility of an attempt at manipulation where a party has filed two motions for recusal of two different decision-makers in the same case.

2. This is Not the Same Matter As NYU I.

The Employer relies upon several sources for the proposition that an adjudicator should disqualify herself from a matter on which she or a member of her law office represented a party. NYU argues that Member Schiffer should recuse herself because she worked in the same office as an attorney who had some involvement in NYU I. Thus, its motion depends upon the contention that this case is the same “matter” as a case that closed 10 years before this case was filed. That contention is preposterous.

While conceding that the judicial code does not directly apply to members of administrative boards, the Employer argues that 28 U.S.C. Sec. 455 regarding the

disqualification of federal judges provides important guidance regarding the circumstances in which adjudicators should recuse themselves. In particular, the Employer relies on 28 U.S.C. Sec. 455(b)(2), which provides that a judge should disqualify himself:

Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it.

As the Employer points out, Board members have cited this provision as relevant to the circumstances in which they should disqualify themselves. The instant case clearly is not the same “matter in controversy” within the meaning of 28 U.S.C. Sec. 455(b)(2). Therefore, application of the law relied upon by the Employer leads to the conclusion that recusal is not warranted.

Some judges have read the phrase “matter in controversy” under Sec. 455(b)(2) to apply only “to the case that is before the Court as defined by the docket number attached to that case and the pleadings contained therein.” Blue Cross & Blue Shield of R.I. v. Delta Dental of R.I., 248 F. Supp. 39, 46 (D.R.I. 2003) and cases cited therein. Accord, Clifton-Jerel: Jones v. Philadelphia Parking Authority, 2011 U.S. Dist. LEXIS 118851 (E.D. PA). This case has different docket numbers and entirely separate pleadings from NYU I. Therefore, under this standard, recusal is not required.

The Employer argues for a broader definition of “matter,” citing regulations and ethical standards governing the practice of former federal employees before the government. Motion for Recusal at 7-8, citing 5 C.F.R Sec. 2641.201 and ABA Model Rules of Professional Conduct, Rule 1.11. The analogy to rules applicable to former employees is questionable, since the restrictions are intended to prevent employees of

the government from handling cases in such a way as to endear themselves to future employers. See Kosby v. Commissioner, 1992 Tax Ct. memo LEXIS 562. On the other hand, the danger that a party will manipulate recusal motions to obtain a preferred decision-maker is not relevant to the practice of former government employees. Nevertheless, even applying the standard espoused by the Employer, it is clear that this is not the same matter as NYU I.

The Employer suggests the following standard for determining whether this case is the same “matter” as NYU I:

A ‘matter’ may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same facts, the same or related parties, and the time elapsed.

(Motion for Recusal at 8, quoting Comment 10 to Rule 1.11 of the ABA Model Rules of Professional Conduct.) Consideration of these three factors leads to the conclusion that this is a different matter.

The facts of this case are different from NYU I. This case involves the terms and conditions of employment of student employees in 2010. Those terms and conditions are substantially different from the conditions in 2000. The largest classification of employees included in the bargaining unit, TAs, has been eliminated, replaced by student adjuncts. The GA classification has also largely been eliminated. Student employees are compensated differently. Until it filed this Motion, the Employer strenuously emphasized that things have changed since 2000. In arguing that the facts are the same, the Employer refers to paragraph 20 of the affidavit of Attorney Brill. That paragraph describes *changes* that have occurred in employees’ terms and conditions of employment.

It is true that the parties have argued about the extent to which terms and conditions of employment have changed since 2000, but that does not mean that the facts in dispute are the same as they were in 2000. If this case is ever decided, the Board will be called upon to make findings about the current terms and conditions of employment of student employees. The extent to which there have been changes since 2000 is relevant to that determination, but it does not mean that the facts are the same. The Board is not now called upon to make findings of fact about the terms and conditions that existed in 2000.

The Employer points to several statements in the briefs of Union counsel to the effect that the Union is seeking to restore the bargaining unit and the bargaining relationship that were created in NYU I. It does not follow either that the facts are the same or that this is the same matter. One major fact that changed between NYU I and now is the bargaining history. At the time of NYU I, there was no bargaining history with respect to the affected employees. Today, there is a history of successful, peaceful collective bargaining with respect to the employees in the unit sought in the petition. The Union has referred to the attempt to re-establish this bargaining relationship because this bargaining history is relevant to the Union's arguments in this case. That bargaining history is just one more *new* fact that was not present at the time of NYU I. Similarly, the Union argues that graduate student adjuncts are a continuation of the TAs under a new title. The Employer disputes that claim. A finding on that question turns on the terms and conditions of the adjuncts today, not on the terms and conditions of TAs a decade ago.

The Employer and its witness Richard Painter characterize this case as involving the same organizing campaign as NYU I. That characterization is clearly incorrect. The first organizing campaign culminated in a vote in favor of representation and the grant of recognition. The parties then established a collective bargaining relationship which produced agreement on a contract that remained in force until 2005, five years after NYU I had closed. That collective bargaining relationship collapsed in a protracted strike when the law was interpreted to deprive these employees of the right to bargain collectively. The UAW then established the Graduate Student Organizing Committee (GSOC) to organize the employees to prepare for an attempt to restore the bargaining relationship. This is not the same organizing “campaign” or a continuation of the first campaign. It is a new campaign to restore bargaining rights that were taken away from a unit of employees.

In summary, the facts at issue in this case are substantially different from NYU I. Job classifications have been changed or eliminated. The form of compensation for students who teach has been changed. There is a history of collective bargaining that occurred after NYU I had been closed. The Union presented expert testimony based upon a study conducted after NYU I had been closed. Evidence was presented in this case that was not offered in NYU I to show that, today, RAs funded by external grants receive compensation for performing services for NYU. Evidence was presented regarding the representation of adjunct faculty members resulting from another petition filed after Member Schiffer had left her employment with the UAW. To the extent that evidence was offered regarding the circumstances in 2000, it was for the purpose of

argument as to whether and to what extent those circumstances had changed over ten years. The facts that matter in this case are those that relate to the present.

The other two factors relied upon in the test suggested by the Employer are easier to consider. It is true that this case involves the same parties as NYU I. On the other hand, ten years passed from the year NYU I was closed and Members Schiffer left her employment with the UAW until the year in which this case was opened. As discussed, a lot occurred in that time period. A collective bargaining relationship was created and destroyed. Job classifications were changed and eliminated. Methods of compensation changed. This passage of time was highly significant.³

Thus, the only factor which supports a finding that this is the same matter as NYU I is the identity of the parties. The law does not require, and the Employer does not argue, that an adjudicator should be disqualified simply because she represented a party 13 years ago. The Employer's argument requires that this be the same "matter," not merely that the parties be the same. Since the facts have changed and a decade has passed, this is not the same matter under the test suggested by the Employer.

A comparison of the cases relied upon by the Employer discloses the flimsiness of its claim that this is the same matter as NYU I. In re Sofaer, 728 A.2d 625 (D.C. Court of App. 1999), involved the former Legal Advisor to the U.S. State Department. In that capacity, he was one of a small number of senior officials who received regular briefings about the criminal investigation and diplomatic actions that arose out of the bombing of Pan Am Flight 103 over Lockerbie, Scotland. He was involved in diplomatic

³ One of the Employer's expert witnesses attempts to minimize the significance of this passage of time by noting that "union organizing takes a long time...." Expert Opinion of Richard Painter at p. 7. While this observation is painfully true in cases where an employer is prepared to expend unlimited resources to delay the administrative process, the fact remains that in NYU I, union organizing was successful and was concluded.

exchanges with an unnamed country and oversaw responses to a subpoena from Pan Am seeking evidence that the U.S. government had advance information concerning the bombing. He left the State Department in June 1990, while the investigation of the bombing was still ongoing. In July 1993, he was retained by the Libyan government to represent it in connection with criminal and civil litigation arising out of the bombing. The court found that the government investigation of the bombing was the same or a substantially related matter to the civil and criminal litigation that arose out of that same bombing. The Employer's argument in this case would be analogous to an argument that Sofaer was precluded from working on a case related to another terrorist bombing years later because he worked on the Lockabie case.

The second case cited by the Employer, American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966), involved allegations of price fixing and fraudulent statements to the patent office concerning the antibiotic tetracycline. In 1959 and 1960, the Senate Subcommittee on Antitrust and Monopoly conducted an investigation of the drug industry, including tetracycline. Paul Rand Dixon served as Chief Counsel and Staff Director of the subcommittee during this investigation. Dixon was in charge of and personally supervised the investigation. He then was appointed Chair of the FTC and participated in the decision in a case involving tetracycline. That case had been filed in 1958. Thus, while the case had been pending before the FTC, he had played a role as an investigator into the very same conduct he later decided as an adjudicator.

Finally, the Employer relies on a case before the NLRB arising out of a 1936 strike at a textile mill. While the strike was in progress, Edwin Smith wrote to a customer of the struck mill, urging a boycott of the mill. The court ruled that he should

have disqualified himself from deciding a case that arose out of the same strike. This case bears little similarity to the instant dispute. To serve as relevant precedent, the court would have had to disqualify Member Smith from a case arising out of another strike at the same mill 10 years later.

Cases that are more comparable to the instant dispute illustrate that recusal is not appropriate. In Pitrolo v. County of Buncombe, *supra*, a judge declined to recuse himself from a sex discrimination case, despite the fact that his law firm had consulted with the plaintiff about pursuing the same issue before an administrative agency. The judge concluded that the administrative case was not the same matter as the court litigation. In the Matter of Intel Corp., 2010-1 Trade Cases (CCH) P 76,889, involved a motion to disqualify a member of the FTC. Commissioner Rosch represented Intel from about 1987 through 1993 in connection with several licensing disputes. He was not disqualified from deciding a case involving licenses dating from 1999, despite a similarity in legal issues. While the parties and the legal issues were the same, a dispute arising six years after his representation did not disqualify him, despite the fact that, unlike Member Schiffer, he had been deeply and personally involved in the earlier matters.

Two cases involving desegregation are particularly informative. Little Rock School District v. Pulaski County Special School District, 839 F.2d 1296 (8th Cir. 1988), involved the decades long effort to desegregate the Little Rock, Arkansas public schools. The trial judge initially consolidated four cases arising out of those efforts. However, when he realized that his former law firm had participated in one of those four cases, he severed that one case, and that case was reassigned to another judge. The

judge continued to handle the three remaining cases. The Court of Appeals agreed that he was not obligated to recuse himself because those three cases were not the same “matter.” Similarly, United States v. Alabama, 582 F. Supp. 1197 (N.D. Al. 1984), involved desegregation of the Alabama public schools, including its state institutions of higher education. While in private practice, Judge Clemon had appeared as counsel of record for some individuals in a “massive” statewide desegregation case, including four institutions of higher learning. The judge was personally involved in that case in 1971 and 1972. Another district court judge ruled that this did not preclude Judge Clemon from hearing and deciding a case filed in 1983 alleging that the Alabama university system was continuing to perpetuate racial segregation. Despite the fact that the cases all involved desegregation of the same school system, the new case was not the same matter as the earlier “massive” case.

In conclusion, this case is not the same matter as NYU I. Like the desegregation efforts in Little Rock and Alabama, there are some issues in common and there is an underlying effort to achieve a goal. In this case, the goal is union representation. In these cases, the goal was to dismantle a system of segregation. The relevant factors establish that this is a different matter. Ten years have passed since NYU I was closed. During that period, the facts as to job classifications, compensation, bargaining history, and other facts relevant to unit determination have changed. Thus, Member Schiffer’s former employment with the UAW is not grounds for disqualification.

III. MEMBER SCHIFFER’S PARTICIPATION IN UAW RETIREMENT PLANS DOES NOT WARRANT RECUSAL

The Employer’s second argument is that Member Schiffer should recuse herself because she receives benefits from various UAW benefit funds. Those benefits are

described in the attached Declaration of Ron Kramer, who manages those funds. Member Schiffer receives a pension from the UAW Staff Retirement Income Plan ("SRIP") which, as the Employer deduces, is a defined benefit plan. The SRIP is currently funded at more than 110% of actuarial liabilities. She has assets in the UAW Strategy Fund, which is one of the investment options for participants in the UAW Staff Severance Plan. As the Employer's expert witness Kathleen Clark deduces, this is a defined contribution retirement plan. The Strategy Fund is a mutual fund offered by Fidelity Investments.⁴ Finally, Member Schiffer is eligible to receive retiree health insurance coverage to supplement Medicare when she reaches age 65. The cost to the UAW of providing this benefit to Member Schiffer is an infinitesimally small percentage of the UAW's assets of more than \$1 billion. In any event, should the UAW fail financially, she would be eligible to receive a Medicare Supplement from her subsequent employment with the AFL-CIO legal department.

The Employer's expert cites Office of Government Ethics 99X6, Memorandum dated April 14, 1999, from Stephen Potts, Director, Regarding 18 U.S.C. Sec. 208 and Defined Benefit Plans (See Opinion of Kathleen Clark, p. 7, fn. 31). That memorandum explicitly authorizes government employees to handle matters involving employers who sponsor their retirement benefits:

In applying section 208 to pension plan interests, we may be concerned about an employees' participation in a Government matter that could have an effect on the sponsoring organization that is responsible for funding or maintaining the ... pension plan. This concern normally arises with defined benefit plans, rather than defined contribution plans, because the sponsor of a defined benefit plan is obligated to fund the plan. For matters affecting the sponsor of a defined contribution plan, an employee's interest is not ordinarily a disqualifying financial interest ... because the sponsor is not obligated to fund the employees' pension plan.

⁴ The title "Strategy Fund" evidently is used in the sense of an "investment strategy."

However, with defined benefit plans, the sponsor may be so closely linked to the pension plan and the particular matter in which the employee would participate may be so significant that the matter affecting the sponsor of the plan will also affect the sponsor's ability or willingness to pay the employees' pension. This might be the case, for example, when an employee is assigned to participate in important litigation... if the litigation could result in the dissolution of the sponsor organization and in its subsequent inability to pay the employee's pension....

OGE believes that, as a practical matter, most government matters in which an employee would participate are unlikely to have a direct and predictable effect on the plan sponsor's ability or willingness to pay the employee's pension. For example, an employee who worked for IBM and who has an interest in a defined benefit plan sponsored by IBM may participate in the decision to deny an award of a \$500,000 contract to IBM for the purchase of computers.

Application of these guidelines to the instant issues leaves little doubt that Member Schiffer need not recuse herself. Benefits from the UAW Strategy Fund and her savings in the credit union do not disqualify her because they do not depend upon the UAW for funding. The SRIP is fully funded. The retiree health insurance benefit is not funded, but Member Schiffer has alternate coverage available to her if the UAW fails to provide this benefit. In any event, there would be no basis for disqualification because this litigation does not threaten the financial soundness of the UAW or its future ability to meet its financial obligations.

IV. CONCLUSION

The Employer has generated a large volume of argument and analysis on the importance of unbiased adjudication and the need to avoid the appearance of prejudice. Despite the impressive scholarship on display, the Employer and its experts completely ignore the competing concern that motions to disqualify should not be used as a tool to manipulate the selection of adjudicators. While it is not surprising that the Employer's

brief disregards this factor, one would expect the expert witnesses to take this factor into consideration. Perhaps they would have displayed more concern had they been informed that this was the Employer's second attempt to hamstring the NLRB in this case through a motion to recuse.

As the Employer has noted, Member Schiffer provided the Senate with assurances that she would not decide cases that she was involved with during her employment with the AFL-CIO. The Senate did not seek similar assurances regarding her employment with the UAW, which ended 13 years before her appointment to the NLRB. The Senate evidently recognized that employment that ended so many years ago does not present a risk of bias.

The Employer has not made a serious argument in support of its motion for recusal. Participation in a party's retirement plans is not a basis for disqualification. Member Schiffer's involvement in NYU I, if any, was very limited and occurred 10 years before this case was filed. This case clearly is a different matter from NYU I.

Accordingly, this Motion for Recusal should be denied.

Dated: Hartford, Connecticut
 October 30, 2013

THE PETITIONER

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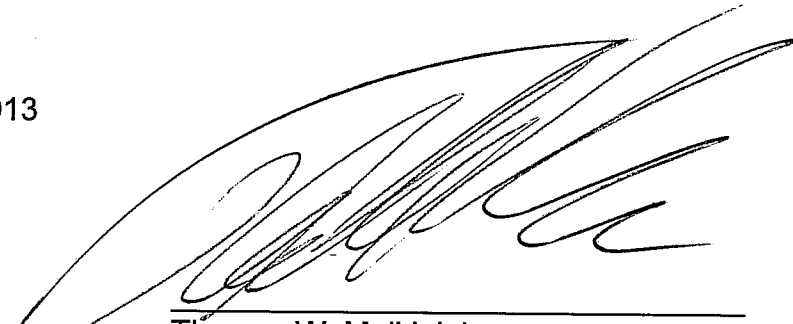
CERTIFICATE OF SERVICE

This is to certify that copies of the within Memorandum In Opposition To Motion For Recusal have been served by electronic mail, on this date, to:

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Dated: October 30, 2013
Hartford, CT



Thomas W. Meiklejohn

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

NEW YORK UNIVERSITY
Employer
and

Case 02-RC-023481

GSOC/UAW
Petitioner

**POLYTECHNIC INSTITUTE
OF NEW YORK UNIVERSITY**
Employer
and

Case 29-RC-012054

**INTERNATIONAL UNION,
UNITED AUTOMOBILE, AEROSPACE,
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA (UAW)**
Petitioner

DECLARATION OF RON KRAMER

Ron Kramer, pursuant to 28 U.S.C. 1746, declares as follows:

1. My name is Ron Kramer. I am employed by International Union, UAW ("UAW"). At UAW, I manage the day-to-day administration of the UAW's retirement benefit plans, both pension and retiree health care.
2. Nancy Jean Schiffer is a UAW retiree, and has been since 2000.
3. Ms. Schiffer receives a monthly benefit from the UAW Staff Retirement Income Plan ("RIP Plan") in the amount of \$4,238.20. The RIP Plan is a defined benefit

pension plan funded entirely by UAW. Currently, the RIP Plan's funding level is 111.73%, measured using the Adjusted Funding Target Attainment Percentage ("AFTAP" – see http://www.irs.gov/irb/2012-30_IRB/ar09.html), which is computed by the Plan's Enrolled Actuary by determining the ratio of the plan's assets to the plan's benefit liabilities. In simple terms, the AFTAP calculation for the RIP Plan means that its assets are greater than its benefit liabilities as reflected in the most recent AFTAP percentage.

4. Ms. Schiffer is also a retired participant in the UAW Staff Severance Plan ("Severance Plan."). The Staff Severance Plan is a defined contribution plan funded by employee contributions and employer-matching contributions. As a retiree, UAW no longer makes any contributions to the Severance Plan on behalf of Ms. Schiffer. The Severance Plan is an IRC Section 401(k) plan under 26 U.S.C 401(k).

5. Retired participants in the Severance Plan, such as Ms. Schiffer, make their own investment selections under the Plan with respect to their balance in the Plan. The Severance Plan uses Fidelity Investments, which offer a range of investment options to retired participants, among them the UAW Strategy Fund. The UAW Strategy Fund is a customized, blended mutual fund created and offered by Fidelity Investments. The portfolio of the UAW Strategy Fund is described in Exhibit A hereto, and includes no property of the UAW.

6. As a retired staff member of UAW, Ms. Schiffer is also eligible to receive retiree health care benefits. Ms. Schiffer is currently age 63 and her husband is over age

65. Once Ms. Schiffer reaches age 65, health insurance coverage provided to her by UAW is a supplement to her coverage under the federal Medicare program.

7. Post-65 Medicare supplemental coverage for Ms. Schiffer and her husband costs the UAW approximately \$15,000 per year. By comparison, the current assets of UAW as reported in the most recent LM-2 report filed by UAW with the U.S. Department of Labor exceed \$1 billion.

8. Upon information and belief, Ms. Schiffer and her husband also receive separate retiree health care coverage from the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"). Even if the UAW were to fail financially, and were thus unable to provide retiree health insurance to Ms Schiffer and her husband, she would still received retiree health insurance coverage from AFL-CIO.

I declare under penalty and perjury that the foregoing true and correct.

Executed on October 29, 2013.



Ron Kramer

EXHIBIT A

UAW Strategy Fund

[Summary](#) [Performance & Risk](#) [Composition](#) [Fees & Pricing](#)

Information on this investment option was provided by your plan sponsor, plan trustee, investment manager, trustee or third party data provider. This investment is not a mutual fund.

Performance ¹ ⓘ

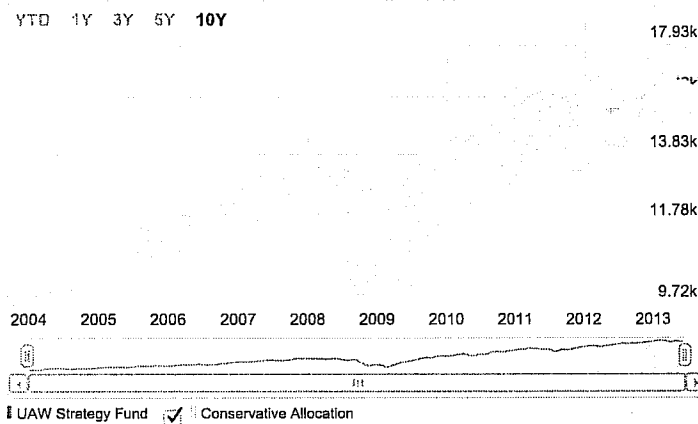
AS OF 6/30/2013

YTD (Daily)*	1 Yr	3 Yr	5 Yr	10 Yr
--	+4.63%	+6.48%	+7.42%	+5.69%

* Daily YTD performance may not be available for all product types.

Hypothetical Growth of \$10,000 ^{2,3} ⓘ

AS OF 6/30/2013; MORNINGSTAR CATEGORY: CONSERVATIVE ALLOCATION



Please note: In this chart if a fund does not have 10 years of performance and is inception mid-month, fund performance starts at the inception date while benchmark and category average begin at the first full month of performance.

Chart uses monthly performance returns which may not be available back to the product's inception date.

The performance data featured represents past performance, which is no guarantee of future results. Investment return and principal value of an investment will fluctuate; therefore, you may have a gain or loss when you sell your shares. Current performance may be higher or lower than the performance data quoted.

[View Performance & Risk, including Quarter-End Returns](#)

Details ⓘ

Morningstar Category	Conservative Allocation
Fund Inception	12/29/2000
NAV	\$19.35
10/28/2013	
Exp Ratio (Gross)	0.484%
6/10/2013	(34.34 per \$1,000)
Turnover Rate	11.37%
1/11/2013	

Top 10 Holdings ⁴ ⓘ

AS OF 6/30/2013

PIMCO Total Return Admin	39.38%
Fidelity Freedom Income	38.77%
Fidelity Spartan 500 Index Inv	21.85%
% of Total Portfolio	100.00%

out of 3 holdings

[View Composition](#)

Fund Overview

Objective

Seeks to preserve capital and achieve a moderate level of income, while offering some potential for capital growth.

Strategy

A combination of three underlying mutual funds. The target asset allocation is as follows: Approximately 40% in the Fidelity Freedom Income Fund®; approximately 20% in the Spartan®; U.S. Equity Index Fund; approximately 40% in the PIMCO Total Return Fund. Share price, yield, and return will vary.

Risk

Stock markets are volatile and can decline significantly in response to adverse issuer, political, regulatory, market, economic or other developments. These risks may be magnified in foreign markets. In general the bond market is volatile, and fixed income securities carry interest rate risk. (As interest rates rise, bond prices usually fall, and vice versa.)

versa. This effect is usually more pronounced for longer-term securities.) Fixed income securities also carry inflation risk and credit and default risks for both issuers and counterparties.

Short Term Redemption Fee

None

Who May Want To Invest

Someone who is seeking to invest in a fund that invests in both stocks and bonds.

Someone who is seeking the potential both for income and for long-term share-price appreciation and who is willing to accept the volatility of the bond and stock markets.

Additional Disclosures

The investment option is a custom strategy fund. This description is only intended to provide a brief overview of the fund.

The UAW Strategy Fund is not a mutual fund. It is a strategy portfolio administered by Fidelity Management Trust Company.

This investment option is not a mutual fund.

Quarter-End Average Annual Total Returns ^{2, 1}

AS OF 6/30/2013; FUND INCEPTION 12/29/2000

EXPENSE RATIO (GROSS): 0.444% AS OF 6/30/2013

	1 Yr	3 Yr	5 Yr	10 Yr	Life of Fund* ⁵
UAW Strategy Fund	4.63%	6.48%	7.42%	5.69%	5.15%

Please visit the [Glossary](#) for definitions of terms on this page

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1. Total returns are historical and include change in share value and reinvestment of dividends and capital gains, if any. Cumulative total returns are reported as of the period indicated. Life of fund figures are reported as of the commencement date to the period indicated and are cumulative if the fund is less than one year old. Total returns do not reflect the fund's [%] sales charge. If sales charges were included, total returns would have been lower.

2. The Morningstar Category Average is the average return for the peer group based on the returns of each individual fund within the group, for the period shown. This average assumes reinvestment of dividends.

3. This chart illustrates the performance of a hypothetical \$10,000 investment made in this investment product (and a benchmark or category average, if shown) from the beginning date shown or on the inception date of the product (whichever is later). Some products do not have monthly performance data available back to inception date. The inception date used for products with underlying funds, or multiple shares classes, or are offered as a separate account, strategy or sub account, may be the inception date of the underlying fund, the earliest share class of the product, or the date composite performance for the product was first made available. The product's returns may not reflect all its expenses. Any fees not reflected would lower the returns. Benchmark returns include reinvestment of capital gains and dividends, if any, but do not reflect any fees or expenses. It is not possible to invest in an index. Past performance is no guarantee of future results. This chart is not intended to imply any future performance of the investment product.

4. Any holdings, asset allocation, diversification breakdowns or other composition data shown are as of the date indicated and are subject to change at any time. They may not be representative of the fund's current or future investments. Some breakdowns may be intentionally limited to a particular class or other subset of the fund's entire portfolio, particularly in asset allocation and hybrid funds, where, for example, the attributes of the equity and fixed income portions are different. Due to time-lags in reporting, the as-of date may be the date the data was reported rather than the date the fund held the assets. For funds that invest in other funds, the underlying funds may report their holdings on different schedules, so the aggregated information presented may include results from a combination of reporting periods.

5. Life of fund returns are from the inception date to the as-of date shown. For commingled pools, the inception date may be the pool's earliest share class. For unitized funds, the inception date may be that of the fund's underlying investment option. For collective investment trusts and products whose strategies are offered to multiple clients, and whose returns may be based on a composite, the inception date may be that of the composite returns' beginning date.

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Generally, the issuer of collective investment trusts is the underlying trust or investment vehicle which issues the units; the issuer of a stock fund is the company which issues the shares; the issuer of options such as separate accounts and strategies is the plan which makes them available; the issuer of a fixed return option is the insurance company or other company which offers the investment; the issuer of an annuity contract is the

insurance company and/or the insurance company separate account.

Generally, the issuer of a mutual fund is the fund or trust which issues the shares; the issuer of collective investment trusts is the underlying trust or investment vehicle which issues the units; the issuer of a stock fund is the company which issues the shares; the issuer of options such as separate accounts and strategies is the plan which makes them available; the issuer of a fixed return option is the insurance company or other company which offers the investment; the issuer of an annuity contract is the insurance company and/or the insurance company separate account.

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